IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 10, 2007 Session

KIMBERLY ANN (VADEN) SMITH v. JEFFREY SMITH

Appeal from the General Sessions Court for Wilson County
No. 13065DVC Robert P. Hamilton, Judge

No. M2006-01390-COA-R3-CV - Filed January 25, 2010

After lengthy divorce proceedings and the entry of several differing parenting plans, the trial court designated the father as the primary residential parent of the two minor children, directed that the children attend the school where the mother teaches rather than in the school zone where the father resides, and ordered the mother to pay child support. The father argues on appeal that the trial court's final order contained numerous errors, including its decision to allow the children to attend school where the mother teaches. We vacate the trial court's award of child support arrearage to Father and remand for reconsideration of that issue. In all other respects, we affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court Affirmed in Part, Vacated in Part

PATRICIA J. COTTRELL, P.J., M.S.,[1] delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J. and TOM E. GRAY, Sp. J., joined.

Ralph O. Frazier, Jr., Dickson, Tennessee, for the appellant, Jeffrey Smith.

C. LeAnn Smith, John Thomas Gwin, Nashville, Tennessee, for the appellee, Kimberly Ann (Vaden) Smith.

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[1]The responsibility to author the opinion for the court was assigned to the authoring judge on June 1, 2009.

OPINION

I. BACKGROUND AND DIVORCE PROCEEDINGS

The divorce proceedings in this case followed a contentious and convoluted course over a period of two years. Jeffrey Smith ("Father") and Kimberly Ann Vaden Smith ("Mother") married in 1993. Two children were born of the marriage. Jordan, a girl, was born in 1998. Jackson, a boy, was born in 2002. Mother filed a complaint for divorce in the General Sessions Court of Wilson County on April 15, 2004, alleging inappropriate marital conduct and irreconcilable differences. In her complaint, she asked the court to award her custody of the children. Father filed an answer and counter-complaint, in which he likewise alleged inappropriate marital conduct and irreconcilable differences, and asked for custody of the children.

The trial of the case was conducted over two days, on April 20 and 21, 2005. The testimony of the parties showed vast disagreement between them as to the reasons for the failure of their marriage. Each presented evidence which suggested that the other parent was not fully engaged in or not fully suited for, the exercise of parental responsibilities. Despite their faults, it nonetheless appears that both parents love the children very much, and that outside of the courtroom they have been able to cooperate with each other, at least to some extent, for the children's sake.

The proof showed that Father works as a software specialist. He earns a good salary, about $80,000 a year, and enjoys a great deal of flexibility in regard to hours of work. Mother had been a schoolteacher prior to the birth of the children. She resumed her teaching career after Jackson was born. Her teaching job at W.A. Wright Elementary School in Mt. Juliet enables her to combine the requirements of child care with her professional responsibilities. Jordan attends the school, and is able to come to Mother's third grade classroom after 2:30 p.m. when school is dismissed. She can then read or play outside with a friend until Mother finishes her work at about 3:30. Jackson is enrolled in a small daycare program at the school at a relatively modest cost with five or six other children of staff members.

At the conclusion of proof, the trial court announced its decision from the bench, which was memorialized in its order of July 8, 2005. The court declared the parties divorced and designated Father as the primary residential parent of the children for the time being, with a permanent parenting plan to be decided upon after further investigation and a hearing to address the disturbing testimony that each party presented about the conduct of the other. Both parents were directed to undergo testing of different sorts prior to the court setting visitation with the children. The court also awarded the marital residence to Father, while

granting Mother a lien against the property in the amount of $36,600, representing her share of the equity, and it divided other property in accordance with its announced intention of maintaining a 50/50 division of the marital assets.[2] Mother moved out of the marital home after the April 2005 hearing.

Both parties subsequently filed competing parenting plans. On July 21, 2005, the trial court conducted a hearing on the competing plans and on several other motions filed by the parties. In a Final Decree of Divorce, dated September 23, 2005, the trial court set aside its previous order, once again declared the parties divorced, and adopted the parenting plan offered by Mother. That plan provided that Father would exercise parenting time every other weekend and most week nights after 5:30 p.m. until he delivered the children to school or to Mother on the following morning.

Under the heading of "Day to Day Schedule," the plan stated that "Mother and Father shall share joint parenting with the minor children. Because the Mother shall exercise slightly more waking hours with the children, the Mother shall be designated Primary Residential Parent." The parents were jointly authorized to make all major decisions regarding each child. The income tax deduction for dependents was equally divided between the parents, and Father was ordered to pay child support to Mother in the amount of $643 per month.

II. POST-DIVORCE PROCEEDINGS

Father subsequently filed a motion to alter or amend the final decree with regard to the parenting plan, while Mother filed a petition of contempt against Father for willful failure to pay child support. The trial court heard testimony about the implementation of the parenting plan and considered Father's arguments during hearings conducted on November 2, 2005 and February 2, 2006.

Father noted that Tenn. Code Ann. § 36-4-402(4) defines the primary residential parent as "the parent with whom the child resides more than fifty percent (50%) of the time," and that there is no mention of "waking hours" in the statute. He also pointed out our Supreme Court's opinion in the case of *Kawatra v. Kawatra*, 182 S.W.3d 800 (Tenn. 2005). The court held in that case that the time a child spends in school or in bed at night should be considered in calculations of parenting time because "the responsibilities of a parent do not

[2]The proof showed that Father began building the house with the help of his own father prior to marriage, and that it was nearly complete when the parties married. Father's father holds the mortgage for the property.

end when a child is asleep, at school or day care, or otherwise out of the parent's presence." *Kawatra*, 182 S.W.3d at 803

Father contended that under the plan adopted by the court, the children would reside close to 70% of the time with him, and he argued that even if only waking hours were considered, he would still have more parenting time with the children than Mother did. Father did not ask for a major change in the actual allocation of parenting time between the parties, but only that he be designated as the children's primary residential parent.

The trial court agreed that the controlling law required it to re-calculate parenting time to determine the proper party to designate as the primary residential parent, but declared that it was not otherwise interested in changing the broad outlines of the parenting plan. On April 26, 2006, the court entered an order in which it declared that it was adopting the parenting plan submitted by Father. Aside from naming Father as the children's primary residential parent, the plan also required that Mother pay child support of $244.50 twice monthly, and it allowed Father to claim the federal income tax deduction for both children. Father subsequently filed a petition for contempt and a motion to clarify the court's order, while Mother filed both a petition for contempt and a motion to set aside the court's order.[3]

Mother's motion alleged that Father had fraudulently made 21 different unauthorized adjustments in the parenting plan he submitted to the court that were not part of the court's ruling. These included changing the ending time for Mother's weekend parenting from 6:00 p.m. to 5:00 p.m.; deleting the provision which allowed Mother to have the children on Sunday nights following Father's weekend parenting times; changing the holiday schedule to give Father additional parenting time; and changing the allocation of authority for the children's educational decisions, religious upbringing and extracurricular activities from "joint" to Father alone.

The court conducted the final hearing in this case on May 5, 2006, which began with a long and inconclusive discussion about the anomalies in the latest parenting plan and the circumstances of its adoption. The court then decided that rather than try to amend the parenting plan of April 26, 2006 to conform to its decision from the bench, it would return to the prior parenting plan, which it had adopted at the time of the Final Decree of Divorce,

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[3]The reversal of the child support obligation from Father to Mother is likely due to the application to the parenting schedule of the following definition from the Child Support Guidelines: "Days" - For purposes of this chapter, a "day of parenting time occurs when the child spends more than twelve (12) consecutive hours in a twenty-four (24) hour period under the care, control or direct supervision of one period or caretaker. The twenty-four (24) hour period need not be the same as a twenty-four hour calendar day. Accordingly, a "day" of parenting time may encompass either an overnight period or a daytime period, or a combination thereof.

and perform a line-by-line examination of its provisions together with the parties and their attorneys.

The order resulting from that examination was filed on May 5, 2006, the day of the final hearing. The order declared that the court was adopting a modified version of "the Permanent Parenting Plan entered on or about September 12, 2005."[4] The new version named Father as the primary residential parent and retained the child support provisions from the plan of April 26, 2006. The remainder of the plan closely tracks the provisions of Mother's plan of September 12, 2005, with the exception of some hand-written amendments added by the trial judge. The court's order also specified that "[i]t is in the best interest of the children that they remain enrolled at W.A. Wright Elementary School where the Mother is employed," and it recalculated the division of marital property to slightly reduce the net payment owed by Father to Mother. This appeal followed.

III. PROCEDURAL ISSUES RE ADOPTION OF THE PLAN

Father has raised eight issues on appeal, seven of which are tied into his argument that the trial court erred by adopting a parenting plan based on Mother's proposal, and that we should, therefore, reject that plan *in toto*. Father challenges the form of the parenting plan and the manner in which the trial court adopted it.

Tennessee Code Annotated § 36-6-404(a) requires a court to incorporate a permanent parenting plan into any final decree in an action for absolute divorce involving a minor child. Such a plan is defined as "a written plan for the parenting and best interests of the child, including the allocation of parenting responsibilities and the establishment of a Residential Schedule." Tenn. Code Ann. § 36-6-402(3). Father focuses on Tenn. Code Ann. § 36-6-404(c)(3)(d), which requires the administrative office of the courts to "develop a 'parenting plan' form that shall be used consistently by each court within the state that approves parenting plans . . ."

Father contends that because the trial court did not use the prescribed form when it adopted the parenting plan on May 5, 2006, but instead modified an earlier plan that likewise did not use the form, the court thereby created a "non-conforming plan" which should be deemed void *ab initio*. He further argues that the only valid plan was the one he presented

[4]The court's order of May 5, 2006 stated that it was in response to Father's "Motion to Clarify Order," which was filed earlier. However, the order addresses the changes to the parenting plan that Mother had asked for in her "Motion to Set Aside Order," and thus we deem it to be responsive to that motion as well.

and which the court adopted on April 21, 2006, and that we should accordingly reinstate that plan.

Father's attempt to elevate form over substance must fail. The legislature has provided that "[f]orms used by parties as parenting plans or adopted by the court for their use, shall conform to all substantive language requirements established by the administrative office of the courts at such time as parenting plan forms are promulgated and approved by that office." Tenn. Code Ann. § 36-6-406(g). The parenting plan on appeal conforms to those requirements, and complies with that statute.

The challenged plan addresses every area set out in the prescribed form, including the designation of a primary residential parent; establishment of a residential schedule of parenting time for both parents, including day-to-day, holiday and vacation schedules; allocation of responsibility between the parents for both day-to-day and major decisions; child support; the allocation between the parents of the federal income tax exemption for dependents; the provision of health insurance; and the rights of both parents under Tenn. Code Ann. § 36-6-101.[5] The plan also closely matches the language of the prescribed form for each of the areas it addresses. Thus, although Father may disagree with the individual provisions of the plan, there is no uncertainty about the meaning of those provisions or about the comprehensiveness of the plan.

We find no basis for vacating the trial court's final judgment because of any alleged error in the form of the permanent parenting plan that was adopted by the court.

Father also argues that the trial court erred by entering the May 5, 2006 parenting plan as a modification of a parenting plan entered September 23, 2005, when there already existed an Order and Parenting Plan entered by the Court on April 21, 2006 that superseded the September 23, 2005 parenting plan. This challenge appears to be based on the trial court's statement that it would use the original plan as the beginning point for drafting a plan reflecting its findings.

We can discover no real difference in effect, regardless of which plan the trial court decided to use as its beginning point. The trial court could have gotten to the same place, *i.e.*, approved the same final parenting plan, either way. For that matter, the court could have started anew and devised the parenting arrangement that is set out in its final order without reference to any prior effort at a plan. Therefore, we cannot see any harm flowing from the trial court using any particular prior order, or no prior order, as a beginning point to draft a permanent parenting plan.

[5]Perhaps more importantly, the plan entered by the court complies with all statutory requirements.

Father's argument seems to be based in part on his view of the status of the September 23 order. We find no difference in the legal status of either of the two prior orders. Neither of those orders ever became final. Pursuant to Tennessee Rule of Civil Procedure 59.04 and 59.05, the orders were subject to alteration, amendment, or modification upon motions filed within thirty days of entry or upon the court's own initiative during that time. *See Arendale v. Arendale*, No. W2005-02755-COA-R3-CV, 2008 WL 481943, at * 1 (Tenn. Ct. App. Feb. 22, 2008) (Tenn. R. App. P 11 application dismissed May 13, 2008). Both the April 21, 2006 order and the September 23, 2005 order were the subject of timely filed motions. On May 3, Mother filed a motion to set aside the order entered April 21, on the ground, *inter alia*, that the parenting plan did not conform to the trial court's oral rulings from the bench. Father's argument is without merit.

Consequently, the final permanent parenting plan adopted by the trial court on May 5, 2006, is the only plan subject to this appeal.

IV. SUBSTANTIVE OBJECTIONS TO THE PLAN

Father sets out his substantive objections to the parenting plan as follows:

> 3. Whether the Trial Court erred in splitting the income tax dependency deduction between the parties each year.
> 4. Whether the Trial Court erred in awarding the Wife visitation with minor children, including extended parenting time every afternoon following school.
> 5. Whether the Trial Court erred in ordering the children to attend school where the Wife teaches rather than where the children are geographically zoned to attend school.
> 6. Whether the Trial Court erred in failing to alternate the Christmas Holiday such that each parent is afforded the opportunity to spend Christmas morning with the children.

In a related argument, Father asserts that the trial court erred in failing to award him child support retroactive to April 21, 2005.

A. THE INCOME TAX DEDUCTIONS

Father argues that the trial court should have awarded him the income tax deductions for both children each year, instead of equally dividing them between the parents. He refers us to the Child Support Guidelines in Tenn. Comp. R. & Regs., ch. 1240-2-4-.01 *et seq*., and particularly to the rules which apply to the Income Shares Model, found at rules 1240-2-4-

.03. That model governs all child support calculations in Tennessee. It "presumes that both parents contribute to the financial support of the child in pro rata proportion to the actual income available to each parent." Tenn. Comp. R. & Regs, ch. 1240-2-4-.03(1)(a).

The income shares model provides a numerical schedule and a worksheet, into which the income of each parent is entered, together with other relevant information, such as the number of children whose support is at issue, the number of other children for whom a parent may have to bear financial responsibility, and the number of days the child or children spend with each parent. The use of the schedule ultimately generates a Presumptive Child Support Order (PCSO), which is the presumptive amount the obligor parent is required to pay the other parent for support of the children.

The trial court is authorized, however, to enter a child support order which deviates from the PCSO if circumstances exist which would justify such a deviation. Any deviation must be supported by written findings of fact. Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(11)(b). Those findings must include the reasons for the change or deviation, the amount of child support that would have been required if the presumptive amount had not been rebutted, how the strict application of the guidelines would have been unjust or inappropriate in the case before the court, and "how the best interests of the children for whom support is being determined will be served by deviation from the presumptive guideline amount." Tenn. Comp. R. & Regs., ch. 1240-2-4-.07(1)(c).

Father relies upon the above requirement and insists that it applies to a provision found in another section of the Guidelines titled "Taxation Assumptions." That provision reads, "[t]he alternate residential parent will file as a single wage earner claiming one withholding allowance, and the primary residential parent claims the tax exemption for the child." Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(b)(6)(b)(2)(ii). Father notes that the trial court did not enter written findings of fact as to the reasons it chose to divide the tax exemption between Father and Mother, nor did it verbally explain its reasoning. Father argues that the trial court accordingly exceeded the discretion granted to it by the Child Support Guidelines, and urges us to reverse that part of the Parenting Plan.

The requirement of written findings of fact to support a deviation is found in a section of the guidelines titled "Presumptive Child Support Order." The section detailing the required contents of such findings specifically refers to deviations from "the amount of support," "the presumptive amount of child support," and "the presumptive guidelines amount." Consequently, written findings are only required for deviations from the amount of the PCSO, and that requirement does not apply to allocation of income tax exemptions.

The trial court in this case did not explain its reasons for dividing the tax exemptions between the parties, so we must examine the record to determine if there is justification for doing so, without according any presumption of correctness to the trial court's decision. *See Curtis v. Hill*, 215 S.W.3d at 839. We find such a justification in the discrepancies between the economic circumstances of the parties. Father earns an income of about $80,000 a year. Mother earns about $30,000 a year as a schoolteacher. Nonetheless, because of the application of the Income Shares Guidelines to the number of days Father is deemed to be exercising parental responsibilities, Mother has been ordered to pay child support to Father rather than the other way around. Each parent must maintain a residence for the children. Mother's lesser income, her child support obligation, and her other economic responsibilities for the children warrant the award to her of the tax deduction for one child. Both parties earn enough to benefit from the income tax deduction, and it is equitable for them to share that benefit. We therefore affirm the trial court's determination.

B. THE RESIDENTIAL PARENTING SCHEDULE

The standard we must apply to our review of a trial court's parenting arrangement was set out by the Tennessee Supreme Court in *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn.2001):

> . . . the standard for appellate review of a trial court's child visitation order is controlled by our decision in *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn.1988). There, we noted that "the details of custody and visitation with children are peculiarly within the broad discretion of the trial judge." *Id*. at 429 (quoting *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App.1973)). Accordingly, we held that a "trial court's decision [on visitation] will not ordinarily be reversed absent some abuse of that discretion." *Id*.
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> In reviewing the trial court's visitation order for an abuse of discretion, the child's welfare is given "paramount consideration," *Id*. (quoting *Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn.1983)), and "the right of the noncustodial parent to reasonable visitation is clearly favored." *Id*. Nevertheless, the noncustodial parent's visitation "may be limited, or eliminated, if there is definite evidence that to permit . . . the right would jeopardize the child, in either a physical or moral sense." *Id*. (quoting *Weaver v. Weaver*, 37 Tenn.App. 195, 261 S.W.2d 145, 148 (1953)).
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> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d

> 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

Eldridge, 42 S.W.3d at 85.

In that same opinion, the Court explained the limitations on our review of parenting arrangements, stating:

> It is not the function of appellate courts to tweak a visitation order in the hopes of achieving a more reasonable result than the trial court. Appellate courts correct errors. When no error in the trial court's ruling is evident from the record, the trial court's ruling must stand. This maxim has special significance in cases reviewed under the abuse of discretion standard. The abuse of discretion standard recognizes that the trial court is in a better position than the appellate court to make certain judgments. The abuse of discretion standard does not require a trial court to render an ideal order, even in matters involving visitation, to withstand reversal. Reversal should not result simply because the appellate court found a "better" resolution. *See State v. Franklin*, 714 S.W.2d 252, 258 (Tenn.1986) ("appellate court should not redetermine in retrospect and on a cold record how the case could have been better tried"); *cf. State v. Pappas*, 754 S.W.2d 620, 625 (Tenn. Crim. App.1987) (affirming trial court's ruling under abuse of discretion standard while noting that action contrary to action taken by the trial court was the better practice); *Bradford v. Bradford*, 51 Tenn.App. 101, 364 S.W.2d 509, 512-13 (1962) (same). An abuse of discretion can be found only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record. *See, e.g., State ex. rel Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000).

Id. at 88.

Father objects to the trial court awarding Mother visitation with the children, including extended parenting time every afternoon following school and to the court ordering that the children should continue to attend school where Mother teaches rather than a school that the children are geographically zoned to attend. His objections are largely based on Mother's prior drug use. Father suggests that she continues to present a possible danger to

the parties' children, and that as a result her contact with the children should be severely curtailed.

Father recognizes the broad discretion given to trial courts in determining matters of custody and visitation and asserts that even though "the right of the noncustodial parent to reasonable visitation is clearly favored, . . . the right of visitation . . . may be limited or eliminated if there is definite evidence that to permit . . . the right would jeopardize the child in either a physical or moral sense." *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988).

We do not disagree with this statement of the law. However, after reviewing the record, we find that the evidence does not preponderate against the trial court's finding that the residential schedule it ordered does not present any risk to the children's welfare. Father did not produce any evidence to suggest that Mother was still involved with drug use or that she was inattentive to her children's needs. Mother points out that while the trial judge acknowledged that she had shown bad judgement in the past, he apparently believed that it was unlikely that such behavior would repeat itself, and he stated that "I really don't think she's a danger." Upon careful consideration of all the evidence and all the testimony in this case, it also does not appear to us that the time the children spend with Mother after school jeopardizes them in either a physical or moral sense, nor do we believe it would be to their benefit for Mother to spend less parenting time with them and for Father to spend more.

As for the question of which school the children should attend, it appeared evident to the trial court as it does to us, that there are significant advantages to having them attend school where Mother teaches, such as allowing any emergent needs of the children to be immediately addressed. Further, ordering the children to attend a different school than the one they have become accustomed to would likely be disruptive to their settled routine and create issues of readjustment. Indeed, at one hearing, Father was asked for his assessment of the suitability of the school for the children and answered as follows:

> Q. You believe it's good for the kids, both of them, to go to the same school where Kim is working; do you not?
>
> A. Yes. I believe that would be best.

We find no basis upon which to reverse the trial court's determination regarding the children's school.

Father also objects to the arrangement the trial court made for the Christmas holidays. The court decreed that Mother was to have the children each year from the day school was dismissed for the holidays until 12:00 noon on December 25. Father was to have the children

from 12:00 noon on December 25 until 6:00 p.m. on January 1. Father had asked at trial for the court to alternate the hours between the parents each year so that he would be able to spend Christmas mornings with the children every other year. The trial court declined Father's request.

Father argues that "it is not in the best interests of the children that they never be allowed to spend Christmas morning with their father." He does not explain, however, how splitting the day is contrary to the children's interest. In any event, the kind of modification Father would have this court make amounts to the "tweaking" we are not allowed to do. *Eldridge v. Eldridge*, 42 S.W.3d at 88.

Mother argues that the trial court erred in declining to designate which parent would have the children on Halloween. That holiday is among those listed on the standard parenting plan form, but it is not a school holiday. Thus, the failure to designate a particular parent for that day would not disrupt the regular weekly schedule under the parenting plan, but would simply default to it. For the same reasons that we affirm the trial court's determination as to Christmas vacation, we affirm its decision as to Halloween.

C. RETROACTIVE CHILD SUPPORT

Father's final argument related to the parenting plan is his assertion that the trial court should have ordered Mother to pay him a greater sum for retroactive child support than it did. In its order of May 5, 2006, the court reiterated its previous order for Mother to pay Father $244.50 twice each month for child support, or $489 monthly. The court also ordered her to pay him $2,934 for child support arrearage. Although the trial court did not explain how it arrived at that figure, both parties acknowledge that it amounts to exactly six months worth of child support at the rate set out in the court's final order.

Father argues that the six months is a random and arbitrary period, selected by the trial court for no particular reason.[6] He asserts that the trial court should also have awarded him child support in the amount of $5,680 for the period after September 23, 2005, when Mother was named as the children's primary residential parent, and before April 26, 2006, when the court reversed itself by naming Father as the primary residential parent. The court had

[6]Mother notes, however, that there was a six month interval between April 21, 2005, when Father was temporarily named as the children's primary residential parent and September 23, 2005, when Mother was given that designation. There was no child support order in effect during that interval, and Mother contends that the trial court intended to compensate Father for its failure to order child support for that period.

awarded Mother child support of $643 per month in its order of September 23, 2005, and Father never paid any of that support.[7]

The trial court's final order of May 5, 2006, clearly characterizes the $2,934.00 award to Father as child support arrearage. The order also states that it was in response, in part, to a pleading by Father requesting "an award for back child support." Father's motion stated:

> In the Court's order entered, September 28, 2005, the Court ordered Father to pay child support. Immediately thereafter, Father filed a motion to modify the order based on the fact that in reality, the Father was the primary parent and the children was with the Father substantially more time than with the Mother and therefore, under state law, he should have been designated primary parent and child support should have been awarded to him. To date, no child support has been paid by either parent. The Father desires that the Court calculate the amount of child support that should have been paid to the Father by Mother and deduct that from the amount of lump sum payment Mother is to receive for her equity in the former marital residence.

Father's argument on appeal is essentially the same: that when the trial court designated Mother as the primary residential parent it was in error, because the children spent more of their residential time with Father than with Mother. In order to "right" this wrong, Father asserts that the trial court should have awarded him child support back to the original ruling on April 21, 2005, thereby ignoring the interim order under which Father was to pay Mother child support.

A brief review of the relevant orders in this case is helpful. Upon filing her complaint for divorce, Mother included a proposed parenting plan asking to be named primary residential parent and for *pendente lite* child and spousal support. That plan was entered as the court's order on April 20 2004, and stated that Father was to pay *pendente lite* child support in accordance with the guidelines in an amount to be determined by the court. In an order entered November 30, 2004, the parties agreed to each assume certain specified expenses, with Father being responsible for the normal and necessary household expenses and the parties dividing day care costs equally. At that time, the parties were still living together with their children, and it does not appear that any child support *per se* had been paid.

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[7]Mother filed a motion for contempt against Father for failing to pay the ordered child support, but the motion was never heard.

In its order filed July 8, 2005, resulting from hearings on April 20 and 21, the trial court designated Father as the primary residential parent, obviously on a temporary basis since the court specifically reserved the issue of a permanent parenting plan. No child support was ordered. In the final decree entered September 28, 2005, the trial court adopted Mother's proposed parenting plan, thereby naming Mother primary residential parent and ordering Father to pay child support.

By order entered April 21, 2006, the trial court adopted Father's parenting plan, but granted Mother a downward deviation from the presumptive child support amount, designated Father as the primary residential parent, and ordered Mother to pay Father child support. The final order, entered July 5, 2006, designated Father as primary residential parent and retained Mother's child support obligation at the same amount, $244.50 twice a month.

Thus, Mother was under an order to pay Father a specific amount of child support only from April 21, 2006. Consequently, no arrearage accumulated against her for any time prior to that date. *See* Tenn. Code Ann. §36-5-101 (f)(1) (stating that if the full amount of support is not paid when the ordered support is due, the unpaid amount is in arrears).[8] The fact that the trial court later reversed itself as to the child support obligor does not automatically make Mother liable for support when she was not under an order to pay it.

We agree with the parties, however, that the amount awarded by the trial court as an arrearage against Mother is not explained in the order, and its basis is not readily apparent from the record. Accordingly, we vacate the trial court's award of $2,934.00 to Father as child support arrearage and remand to the trial court for calculation of the arrearage due, if any.

Father also supports his argument for additional retroactive child support by relying on certain provisions of the child support guidelines. Tenn. Comp. R. & Regs., ch. 1240-2-4-.06. When parents divorce, the child support obligation is to be set at the time of divorce. Tenn. Code Ann. § 36-5-101(a)(1). Courts are authorized to provide for the future support

[8]This statute means that Father's failure to pay any support while he was under court order to do so technically put him in arrears. However, the issue of any arrearage owed by Father is not raised in this appeal. Since Father filed a motion to alter or amend shortly after entry of the order creating his child support obligation, the trial court had authority to modify the support order back to the date of the motion. Nonetheless, under almost all circumstances a party is obligated to obey the lawful orders of a court, even when that party rightly believes those orders to be in error. *Frye v. Frye*, 80 S.W.3d 15, 19 (Tenn. Ct. App. 2002); *Brooks v. Brooks*, No. M2007-00351-COA-R3-CV, 2009 WL 928283 at *10 (Tenn. Ct. App. April 6, 2009) (no Tenn. R. App. P. 11 application filed).

of children by fixing a definite amount to be paid in regular installments or otherwise, as circumstances may warrant. Tenn. Code Ann. § 36-5-101(a)(2)(A). The amount dictated by the guidelines is to be applied as a rebuttable presumption of the correct amount of support. Tenn. Code Ann. § 36-5-101(e)(1)(A).

The child support guidelines provide "in cases in which initial support is being set, a judgment must be entered to include an amount of monthly support due . . . [f]rom the date [o]f separation of the parties in a divorce . . . ." Tenn. Comp. R. & Regs 1240-2-4-.06(1)(b). Based on this provision, Father argues that he is entitled to retroactive support back to the date Mother left the marital home (which was during the pendency of the divorce action). We do not agree with Father's argument.[9]

From the date the parties separated, there has been a *pendente lite* order of child support in place. Courts have the discretion, at any time during the pendency of a divorce action, upon motion, to make any order providing for the support of the minor children during the pendency of the suit. Tenn. Code Ann. § 36-5-101(*l*)(1). *Pendente lite* orders of support provide for the needs of the children during the pendency of a divorce action. Therefore, there is no retroactive support due for any period covered by a *pendente lite* order. Stated another way, a *pendente lite* order for child support is the initial order regarding child support. It does not further the goals of child support statutes or guidelines to order retroactive support against a parent who was complying with an interlocutory or *pendente lite* order that ensured the children's needs were met during the pendency of their parents' divorce action. *See Wade v. Wade*, 115 S.W.3d 917, 923 (Tenn. Ct. App. 2002) (stating that child support should inure to the benefit of the child); " Tenn. Comp. R. & Regs. ch. 1240-2-4-.01(3)(e) (stating that one purpose of the guidelines is "[t]o ensure that when parents live separately, the economic impact on the child is minimized . . . .")

V. DIVISION OF MARITAL PROPERTY

Father also lists an eighth issue, which is not related to the parenting plan: "Whether the Trial Court erred in the calculation of the marital division by dividing Husband's checking account twice."

Both parties have raised issues about the trial court's division of the marital property. Father argues that the court made an erroneous calculation by equally dividing the funds in a checking account in his name that held approximately $10,500 in April of 2004, when the trial court conducted the initial divorce hearing. He contends that the parties divided their

[9]Further, it is unclear from the record whether Father ever requested at trial the support that he claims to be entitled to under the guidelines.

savings account just prior to trial, on April 15, 2004, with each party receiving approximately $4,000. He further asserts that he deposited his share in his checking account, and that as the result of the trial court's decision to equally divide the contents of that account, his share of the savings account was divided twice.

Father points out that he raised this issue during the hearing of February 2, 2006, and he asserts that the trial court agreed to reduce Mother's share of the marital property accordingly, but that in its order of May 5, 2006, the court failed to make the adjustment it agreed to. However, we have read the transcript of the hearing of February 2, 2006, including discussions about the disputed accounts between Father's attorney and the judge. While the judge asked the attorney a series of questions to better understand the basis of his argument, the judge's responses to the attorney's answers, contrary to Father's assertions, do not indicate that the court agreed.

A trial court is charged with equitably dividing, distributing, or assigning the marital property "without regard to marital fault in proportions as the court deems just." Tenn. Code Ann. § 36-4-121(a)(1); *Jolly v. Jolly*, 130 S.W.3d 783, 785 (Tenn. 2004). The court is to consider all relevant factors in its distribution, including those listed in Tennessee Code Annotated § 36-4-121(c). *Jolly,* 130 S.W.3d at 786; *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003). The court may consider any other factors necessary in determining the equities between the parties, Tenn. Code Ann. § 36-4-121(c)(11), except that division of marital property is to be made without regard to marital fault. Tenn. Code Ann. § 36-4-121(a)(1). The factors the courts should consider in making a division of the marital estate include:

> (1) The duration of the marriage;
>
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
>
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
>
> (4) The relative ability of each party for future acquisitions of capital assets and income;
>
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
>
> (6) The value of the separate property of each party;
>
> (7) The estate of each party at the time of the marriage;

(8) The economic circumstances of each party at the time the division of property is to become effective;

(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;

(10) The amount of social security benefits available to each spouse; and

(11) Such other factors as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-4-121(c).

The trial court's task is to make an equitable, or fair, distribution of property. Tenn. Code Ann. § 36-4-121(a)(1). The statute requires an **equitable** division of marital property, not an **equal** division. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002).

"The trial court is empowered to do what is reasonable under the circumstances and has broad discretion in the equitable division of the marital estate." *Keyt v. Keyt*, 244 S.W.3d 321, 328 (Tenn. 2007) (citing *Flannary*, 121 S.W.3d at 650). Because the division of marital property is "not a mechanical process," and because decisions regarding division of marital property are fact-specific and many circumstances surrounding the property and the parties play a role, a trial court has a great deal of discretion concerning the manner in which it divides marital property. *Keyt*, 244 S.W.3d at 328; *Jolly*, 130 S.W.3d at 785; *Flannery*, 121 S.W.3d at 650; *Smith v. Smith*, 984 S.W.2d 606, 609 (Tenn. Ct. App. 1997).

Thus, the trial court is endowed with a great deal of discretion in the manner it which it divides marital property. *Manis v. Manis*, 49 S.W.2d 295 (Tenn. Ct. App. 2001); *Loyd v. Loyd*, 860 S.W.2d 409 (Tenn. Ct. App. 1993). "[U]nless the court's decision is contrary to the preponderance of the evidence or is based on an error of law, we will not interfere with the decision on appeal." *Sullivan v. Sullivan*, 107 S.W.3d 507, 512 (Tenn. Ct. App. 2002)(citing *Goodman v. Goodman*, 8 S.W.3d 289, 298 (Tenn. Ct. App. 1999)). Accordingly, appellate courts ordinarily defer to the trial court's decision unless it is inconsistent with the factors in Tenn. Code Ann. §36-4-121(c) or is not supported by a preponderance of the evidence. *Jolly*, 130 S.W.3d at 785-86.

In determining the equity or fairness of a decision on division of marital property, courts, including appellate courts, are to look at the fairness of the distribution of the entire marital estate, not just one piece of property. Whether or not the trial court herein agreed that the money in Father's checking account included money that had already been divided by agreement of the parties (which agreement is by no means certain), we must look at the

overall distribution, in accordance with the statutory factors, and in view of our limited standard of review. Having made that analysis, we conclude that the trial court's final distribution of the marital estate was equitable. We, therefore, affirm the trial court's division of the checking account, as part of the overall distribution.

For her part, Mother argues that the trial court erred in its calculation of her share in the equity of the marital home. The proof showed that Father acquired the property upon which the marital home was built two months before the parties married, using his own separate funds. He and his father immediately began the process of construction. Mother acknowledges that the foundation, the subflooring, flooring, decking and walls of the home had been completed by the time of marriage. Father testified that he believed the value of the property prior to marriage was $60,000.

In the final decree of divorce, the trial court awarded the marital home to Father, while granting Mother a lien against the property in the amount of $36,600, representing one-half of the calculated value of the equity in the property, or $73,200. Among the components of the court's calculation of the equity subject to division was the subtraction of a value of the home of $60,000 at the time of the parties' marriage.[10] Mother does not challenge the classification of the value of the marital home at the time of the marriage, nor does she argue that no value should be deducted.

Instead, Mother argues on appeal that the trial court should have only used the purchase price of the real property, $17,500, in its calculations, because there was no written documentation to support the trial court's conclusion that the property was worth $60,000 at the time of marriage. However, she acknowledged that considerable materials and labor had gone into the property prior to marriage, and that Father had testified to a value of $60,000. In Tennessee an owner of property may testify as to the value of that property. *State ex rel. Smith v. Livingston Limestone Co., Inc*., 547 S.W.2d 942, 943 (Tenn. 1977); *Airline Const. Inc. v. Barr* 807 S.W.2d 247, 254 -255 (Tenn. Ct. App. 1990). Mother did not cite any law to support the proposition that the trial court cannot place a value on improvements to property in the absence of written documentation, nor did she present any evidence to contradict Father's valuation testimony. Therefore, the evidence does not preponderate against the trial court's finding that the equity in the marital home subject to division as marital property was $72,600.

[10]The other components of the court's calculations were an appraised value of $230,000 for the home, from which were subtracted a mortgage of $83,000 and a real estate commission of $13,800 based on 6% of the property's appraised value.

VI.

That part of the judgment ordering Mother to pay an arrearage $2,934.00 is vacated. The order of the trial court is affirmed in all other respects. We remand this case to the General Sessions Court of Wilson County for any further proceedings necessary. Tax the costs on appeal to the appellant, Jeffrey Smith.

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PATRICIA J. COTTRELL, P.J., M.S.